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# Supreme Court of the United States

October Term, 1962

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No. 11

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JOHN THOMAS AVENT, et al.,
Petitioners,

vs.

STATE OF NORTH CAROLINA

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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## BRIEF OF THE STATE OF NORTH CAROLINA

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# BRIEF OF THE STATE OF NORTH CAROLINA

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## OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported as STATE v. AVENT, STREETER, COLEMAN, BROWN, PHILLIPS and NELSON, 253 N. C. 580, 118 S. E. 2d 47. The opinion of the Supreme Court of North Carolina was filed on January 20, 1961. The opinion also appears in the transcript of record, hereafter referred to as "R", on p. 73. Judgment of the Superior Court of Durham County, in which the petitioners were originally convicted, appears on R. 15 and is not otherwise officially reported but is recorded in the minutes of the Clerk of the Superior Court of Durham County.

## JURISDICTION

The petitioners obtained an extension of time in which

to file petition for certiorari and filed their petition on May 4, 1961, within the time allowed, and on June 25, 1962, this Court granted a writ of certiorari, as appears on R. 92. The petitioners invoked the jurisdiction of this Court upon an allegation that they have been denied rights guaranteed by the Fourteenth Amendment and as provided by 28 USCA 1257(3).

North Carolina denies that there is any substantial federal question presented and further denies that petitioners were deprived of any rights, privileges or immunities secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) The petitioners invoke a portion of the Fourteenth Amendment of the Constitution of the United States as quoted below:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) The petitioners were convicted under Sec. 14-134 of the General Statutes of North Carolina, which is as follows:

> "Sec. 14-134. *Trespass on land after being forbidden.*— If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days."

## QUESTIONS PRESENTED

The State of North Carolina submits the following as the questions presented in this case:

(1) Does Section 1 of the Fourteenth Amendment prohibit the operator of a private enterprise from selecting the patrons, customers or clientele he will serve, and does it prohibit such operator of a private enterprise from making such selection based on color if he so desires?

(2) Do the provisions of Section 1 of the Fourteenth Amendment prohibit the Courts of North Carolina from applying the State's general trespass statute to the petitioners, who are both colored and white, upon the request of a proprietor or private owner of a restaurant or luncheonette?

(3) Is the operation of a mercantile establishment, which has a luncheonette department, a business affected with the public interest so that the owner and operator must serve without discrimination all who seek service?

(4) Is Section 14-134 of the General Statutes of North Carolina void in that it is vague and indefinite, and, therefore, does not set forth an ascertainable standard of conduct?

(5) Under the circumstances of this case were the petitioners denied freedom of speech in violation of Section 1 of the Fourteenth Amendment?

## PROCEEDINGS IN THE NORTH CAROLINA COURTS

Petitioners were indicted in the Superior Court of Durham County on separate bills of indictment (R. 1) for a violation of the general criminal trespass statute (Sec. 14-134, General Statutes of North Carolina). Briefly, it is charged that petitioners unlawfully entered upon and refused to leave the premises of S. H. Kress & Company after being ordered to do so by the agent and manager. The indictments were all consolidated for trial (R. 15) and on July 1, 1960, the jury returned a verdict of guilty as to each petitioner. The trial judge pronounced judgment (R. 16) in the various cases, and the petitioners appealed to the Supreme Court of North Carolina.

After briefs had been filed and oral arguments the Supreme Court of North Carolina filed its opinion on January 20, 1961, in which it affirmed the judgments of the lower court (STATE v. AVENT, STREETER, COLEMAN, BROWN, PHILLIPS and NELSON, 253 N. C. 580, 118 S. E. 2d 47). North Carolina does not allow petitions to rehear in criminal cases. The petitioners filed application for certiorari on May 4, 1961, and this Court granted Certiorari on June 25, 1962.

## NORTH CAROLINA'S STATEMENT OF THE CASE

The State of North Carolina contends that the evidence in these cases supports a statement of facts, as follows:

1. Five of the petitioners (Streeter, Phillips, Callis Napolis Brown, Shirley Mae Brown and Avent) are persons of the colored race, and two of the petitioners (Joan Harris Nelson and Frank McGill Coleman) are persons of the white race.

(2) Joan Harris Nelson (Trumpower) gave a Washington address of a Negro friend at Howard University. She is a member of the white race and her husband is part white and part Indian (R. 42, 43). On May 6, 1960, she was a student at Duke University and at the time of the trial she was living in Alexandria, Virginia.

(3) Frank McGill Coleman is a member of the white race. He was born in Vicksburg, Mississippi, now lives in Pittsburgh, and at the time of trial was a student at Duke University (R. 45, 46).

(4) The remaining petitioners are colored persons, live in the State of North Carolina, and at the time of trial were attending North Carolina College at Durham. (R. 36, 39, 43, 47, 48).

(5) The petitioners had previously been engaged in picketing the Durham Store of S. H. Kress & Company and in urging a boycott of the store unless their demands for luncheon service were met (R. 21, 36, 41, 43, 46, 48, 49).

(6) It is clear from the evidence that all these demonstrations and sit-ins were the result of concerted action and previous agreements (see evidence of Callis Napolis Brown R. 44, 45). The organization had counsel and had consulted counsel about these matters (R. 37). It would seem also that the matter of furnishing bond had already been considered and was left to the attorneys (R. 38). This demonstration took place on May 6, 1960, but attorneys had been consulted as early as February, 1960, (R. 38). It is also clear from the evidence that a meeting had been held on the night before May 6, 1960, strategy had been planned, and it was agreed to make a purchase in some other part of the store before going to the lunch counter (R. 37, 40, 44, 45, 48, 49). The object, therefore, was to create a test case in the Courts.

(7) S. H. Kress & Company operates a store on West Main Street in the City of Durham (R. 20). The Company has two selling floors and three stockroom floors (R. 21). On the first floor the Company provides a stand-up counter where food is served and at this counter both white and colored people are served whether they accompany each other or not (R. 22, 40). There is a luncheonette department at the rear of the basement floor (R. 21). This department had signs posted saying that the luncheonette was open for the purpose of serving invited guests and employees only. There were iron railings separating this department from the other departments, and on the date in question there were chained entrances (R. 21). Mr. W. K. Boger, Manager of the store in Durham had been with the Company for 30 years (R. 24). He gave evidence that there were two reasons for not serving colored people in the luncheonette: (a) The store management followed the customs of the community, and (b) that it was also in the interest of public safety (R. 22).

(8) While some portions of the evidence are conflicting, the State of North Carolina contends that the evidence supports the version of events hereinatfer stated. The petitioners, and others as they previously planned, went to the first floor and made purchases, keeping their receipts and the

articles which were later offered in evidence (R. 35, 37, 39, 40, 43, 45, 46, 47, 48, 49). There were some 35 to 40 persons involved in this demonstration but they did not all go to the luncheonette at the same time (R. 37, 49). The Manager (W. K. Boger) testified that he asked these petitioners not to be seated and told them that the luncheonette department was open only to employees and invited guests. After the petitioners seated themselves the Manager asked them to leave and they refused to leave until they were served. The Manager called an officer of the Police Department and this officer asked them to leave and they would not. The officer then arrested petitioners on a charge of trespass (R 21). The evidence of the police officer is to the same effect except in his narrative he says that when he arrived he found Brown seated at the lunch counter, arrested him and started back to the station but before he got to the street someone shouted: "You had better go back." He went back downstairs and there were 30 or 40 seated; after they were told to leave (these petitioners) he made the arrests (R. 26). The other officer testified (R. 25) that he asked the petitioners to leave and that he heard Mr. Boger ask them to leave (R. 25).

## ARGUMENT

### I

### THE GENERAL TRESPASS STATUTE OF NORTH CAROLINA

Along with many states North Carolina has a general trespass statute which has been a part of the State's code for almost a century. This statute was first enacted in 1866 (Chap. 60, Public Laws of 1866) and now appears as Section 14-134 of the General Statutes of North Carolina. In 1943 this Court made reference to the fact that general trespass statutes existed in at least 30 states, and that similar laws of narrower scope were on the books of at least 12 states. (MARTIN v. STRUTHERS, 319 U. S. 141, 63 S. Ct. 862, 87 L. ed. 1313). Closely related is another statute on forcible entry and detainer, which reads:

> "Sec. 14-126. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

The above statute is in substantially the language of the English statute (5 Ric. II, c. 8) and came to this State from England, and it is believed that the concept in the general trespass statute is expressed in the Common Law. These statutes, therefore, existed long before colored people even dreamed of taking possession of a luncheonette by means of a sit-in demonstration.

In explaining these statutes the Supreme Court of North Carolina said (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295):

> "Our statutes, G. S. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense."

The Supreme Court of North Carolina as early as 1885 described a trespasser; and has done so in many cases before these petitioners were convicted (STATE v. COOKE, 246 N. C. 518, 98 S. E. 2d 885; STATE v. GOODSON, 235 N. C. 177, 69 S. E. 2d 242; ARMSTRONG v. ARMSTRONG, 230 N. C. 201, 52 S. E. 2d 326; LEE v. STEWART, 218 N. C. 287, 10 S. E. 2d 804; BRAME v. CLARK, 148 N. C. 364, 62 S. E. 418; STATE v. WILSON, 94 N. C. 840). The Supreme Court of North Carolina also explained the use of the word "enter" which appears in the statute (State v. Clyburn, Supra):

"What is the meaning of the word 'enter' as used in the statute defining criminal trespass? The word is used in G. S. 14-126 as well as G. S. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G. S. 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. S. v. GOODSON, supra; S. v. FLEMING, 194 N. C. 42, 138 S. E. 342; S. v. ROBBINS, 123 N. C. 730; S. v. WEBSTER, 121 N. C. 586; S. v. GRAY, 109 N. C. 790; S. v. TALBOT, 97 N. C. 494. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass'. It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent."

The essential rights and duties under the trespass statute (G. S. 14-134) are explained in STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424: Entry upon the land of another under a *bona fide* claim of right is not a criminal offense (STATE v. CROSSET, 81 N. C. 579), but a mere belief of a claim of right is not sufficient for there must be proof of title or evidence of a reasonable belief of the existence of the right of entry (STATE v. FISHER, 109 N. C. 817, 13 S. E. 878; STATE v. DURHAM, 120 N. C. 546, 28 S. E. 22). A *bona fide* claim of right must be passed upon by a jury (STATE v. WELLS, 142 N. C. 590, 55 S. E. 210) but a claim of right is not a mere abstraction since there must be evidence of such a claim or facts giving rise to a reasonable and *bona fide* claim (STATE v. FAGGART, 170 N. C. 737, 87 S. E. 31).

An assertion by counsel for the plaintiffs to the effect that these trespass statutes have been administered solely or for the most part against colored persons is utterly untrue, and a survey of the decisions of the Supreme Court of North Carolina will support our view! In fact, it is interesting to note that in 1899 six white men entered in and upon a small tract of land containing 20 acres that was owned by an old colored woman and over her protest cut and carried off the timber on her land. The white men were convicted for this conduct for violating the statute on forcible trespass, and this con-

viction was sustained by the Supreme Court of North Carolina (STATE v. ELKS, 125 N. C. 603, 34 S. E. 109).

The owner of property under the laws of North Carolina has a right to use sufficient force to remove a trespasser from his premises. In 1903, in the case of STATE v. CROOK, 133 N. C. 672, 45 S. E. 564, the Supreme Court of North Carolina corrected the lower court on an instruction on this point, and said:

> "We think the true rule which should have controlled the conduct of Frank upon the evidence on the point was that he had a right in the first place to direct Jeff to leave his premises; that in case of refusal he might have laid his hands on him gently, for the purpose of removing him from his premises; and if that course did not bring about the desired result, then he might have used sufficient force under all the circumstances to put him off. The law would not authorize one to use excessive force in removing a trespasser from one's premises, but the jury should not weigh in golden scales the amount of force used for such purpose."

The law of trespass as interpreted by the North Carolina Supreme Court has said that even though a person has a right to pass along the way, and that the entry, if peaceable, is not even a civil trespass, yet, as soon as such person or persons violate the possession of the owner, create disturbance or commit violence, they become trespassers *ab initio* (STATE v. BUCKNER, 61 N. C. 558).

The Court will find the subject of trespass discussed in 37 North Carolina Law Review 71, and the Court will find the history of trespass statutes in North Carolina in 39 N. C. Law Review 121, as well as STATE v. DAVENPORT, 156 N. C. 596, 72 S. E. 7. We have discussed the trespass laws to some extent, and we have shown from the cases that they have been applied in favor of the colored people, against colored people, and an examination of the cases will show that they have been applied in favor of white people and against white people.

II

## CONSTITUTIONAL AND STATUTORY SEGREGATION IN NORTH CAROLINA

In order to create prejudice against the State of North Carolina before this Court, counsel for petitioners has referred to certain segregation laws, some of which are on the statute books of the State. We think that some answer should be made to these charges.

First of all, it is stated that the various bills of indictment (R. 1) are marked "CM" or "CF", which designate the defendant in the bill as colored male or colored female. It will also be seen, for example (R. 5), that the white persons indicted are designated as "WM" or "WF", which represents white male or white female. This is standard practice on bills of indictment for the reason that the State keeps criminal statistics, and it has a right to make studies to see whether or not certain patterns of crime develop along racial lines. There are certain tribes of Indians in the State and people of other racial descent, and we see no constitutional reason why we should not keep such records. We are informed that certain colored organizations tried to prohibit all racial designations in the Bureau of Census in the Department of Commerce but that the Census Bureau continues to compile statistics and make enumerations of population on a racial basis. After all, some power created colored people, and this is a fact which would still exist even though there was a judicial decree to the contrary.

It is true that G. S. 127-6, as to the North Carolina National Guard, provides for white troops and colored troops but to date scarcely any colored persons have made any application for enlistment in the National Guard.

It is said that the statutes as to segregation in our schools have been repealed but that school segregation continues to be enforced by other means. The charge that without a single exception school boards have made initial assignments of

white pupils to previously white schools and Negro children to previously Negro schools is not true. The Charlotte School Board of its own motion assigned some 40 to 50 Negro children to white schools, and some assignments have been made in Raleigh and Winston-Salem by the school boards upon their own motions. We have tried to change a way of life which previously existed without arousing any more resentment than possible. While North Carolina was asked to file a brief *amicus curiae* in the second *Brown Case*, neither the State nor its units of government have yet been brought before this Court on public school matters.

As to mental institutions, orphanages, schools for the blind and deaf and training schools, the State recognizes that where State action is concerned there can be no discrimination in the use of facilities. Recently a suit was brought in the Federal District Court to compel the admission of a colored child into Murdoch School for Mentally Deficient Children. The State answered and admitted the right of the child to be admitted to the State Institution but alleged that the child would have to take its turn on the waiting list, and the parents of the child had been given this information prior to the suit.

We do keep separate tax books for white, Negro, Indian and corporate taxpayers as we have found that this greatly facilitates the collection of delinquent taxes. We are not aware that it is a violation of the Constitution to show the true race of a person on official records. For that matter our Bureau of Vital Statistics keeps its birth certificates on a racial basis as to all races. There are racial distinctions in cemeteries to which situation as far as we know no person has raised any question. There are separate funeral homes but petitioners do not actually point to any statute which prohibits a white person from using the services of a Negro funeral home or the reverse. Petitioners to support this assertion cite G. S. 90-212, which deals with the distribution of bodies to the various funeral homes where prisoners die and their bodies are not claimed by relatives.

The Charlotte ordinance which sets the area within which Negro police have authority has no doubt been found to be the best way of utilizing such police services. We commend counsel for petitioners for saying that we do not require segregation in State Parks.

Referring to the statutes as to transportation, waiting rooms, city buses, and, in fact, in all matters connected with transportation, segregation has been abolished for some time. Both races use city buses without any seating arrangements. Both races use the same waiting room in bus stations, although the former colored waiting room in some stations is still left open for those colored people who still have some pride of race and wish to be with each other. As a matter of fact, colored people have their choice of waiting rooms; there is no segregation in either intrastate or interstate transportation.

There are separate rest rooms for the races in the operation of private business, and it is true that in the inspection of cafes and restaurants the grade forms do contain criteria as to the adequacy of rest rooms for each sex and race. We find that we have more peace and get along better on this basis.

There is still a statute on the books (G. S. 58-267) which prohibits fraternal orders from doing business in the State if white and colored persons are members of the same lodge.

The Constitution and statutes of North Carolina do still prohibit intermarriage of white persons to Negroes to the third generation inclusive. Just as Mr. Justice Holmes thought that three generations of mentally deficient people were enough we still think that a hybrid race will not improve either race.

We are not familiar with all of the city ordinances that remain on the books as a carry-over from the days of absolute segregation. We are a Southern State, and we lived formerly in that manner; these vestiges will not disappear all at once. It is thought that there are even some segregation practices in northern states.

Wherever there has been State action or an exertion of power by governmental units and this has been brought before the Supreme Court of North Carolina that Court has always recognized the Constitution of the United States as the supreme law of the land. In CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163, the Supreme Court of North Carolina said:

> "Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown case* is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid."

We are all, of course, a product of the environment or milieu into which we are born, along with the type of culture, customs and entrenched patterns of behavior that prevail at the time. To charge us with following a custom of segregation is indeed emphasizing the obvious and represents an attempt to convert the well-known facts into a great discovery. One is reminded of the statements of George Bernard Shaw in regard to certain biologists who set out to prove certain facts well-known to mankind. He said that such scientists were "solemnly offering us as epoch-making discoveries their demonstrations that dogs get weaker and die if you give them no food; that intense pain makes mice sweat; and that if you cut off a dog's leg the three-legged dog will have a four-legged puppy." (Preface to *Back to Methuselah*)

It is believed that counsel for the petitioners partake of the

environment and customs into which they are born and that they, as well as ourselves, have their customs, culture and mores spoon-fed and given to them by a process of indoctrination. It is submitted, therefore, that before we are condemned and now held up to scorn because we thought we could choose our associates it should be remembered, and, in fact, it should not be forgotten at all, that prior to 1954 we had judicial sanction and approval for our customs and practices on the part of both Federal and State Courts.

III.

## THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE OPERATOR OF A PRIVATE ENTERPRISE FROM SELECTING THE PATRONS, CUSTOMERS OR CLIENTELE HE WILL SERVE NOR DOES IT PROHIBIT HIM FROM MAKING SUCH SELECTION ON THE BASIS OF COLOR IF HE SO DESIRES.

Under this subject we desire to discuss the first two questions which we have given as the Questions Presented in our brief.

Putting to one side the ancient and long accepted rules as to innkeepers, cab transportation and grist mills, we submit that the Supreme Court of North Carolina is clearly supported by the great weight of authority when it said (State v. Avent, et al., Supra):

> "No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant, privately operated in a privately owned building has a right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa,

if he so desires. He is not an innkeeper. This is the common law."

To support this proposition there are several cases (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295; WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, 4 Cir., 268 F. 2d 845; SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., 181 F. Supp. 124, aff'd. per curiam 4 Cir., 284 F. 2d 746; GRIFFIN v. COLLINS, 187 F. Supp. 149; DREWS v. MARYLAND, 224 Md. 186, 167 A. 2d 341; RANDOLPH v. COMMONWEALTH, 202 Va. 661, 119 S. E. 2d 817; GRIFFIN v. MARYLAND, 225 Md. 442, 171 A. 2d 717; ALPAUGH v. WOLVERTON, 184 Va. 943, 36 S. E. 2d 906; NANCE v. MAYFLOWER RESTAURANT, 106 Utah 517, 150 P. 2d 773; HENDERSON v. TRAILWAY BUS CO., 194 F. Supp. 423; ARMWOOD v. FRANCIS, 9 Utah 2d 147, 340 P. 2d 88; POWELL v. UTZ, 87 F. Supp. 811; BROWDER v. GAYLE, 142 F. Supp. 707, aff'd 352 U. S. 903, 1 L. ed. 2d 114, 77 S. Ct. 145).

In WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, supra, Judge Soper, writing for the Fourth Circuit Court of Appeals, on this subject said:

> "The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the states from making or enforcing any *law* abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

"This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulson by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. ed. 1161:

> "'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'"

In SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., 181 F. Supp. 124, the plaintiff took the position that the decisional law of the State of Maryland sanctioned the custom, practice and usage of segregating the races in restaurants. In answering this contention the Court said:

> "Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers."

In HENDERSON v. TRAILWAY BUS CO., 194 F. Supp.

423, Judge Albert V. Bryan, whose record shows him to be an objective judge, said:

> "But, in any event, the critical factor is that the statutes apply only to places where a person goes 'without authority of law', meaning property not at the time affected with the public interest. Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use. * * * After accrediting all of the plaintiffs' testimony with its face value, still no proof appears of discrimination against Negroes in the invocation of the statutes. There are no instances adduced of differentiation between the races in the execution of these laws. Indeed, the evidence reveals that both whites and Negroes were arrested for the transgressions, as well as persons identified as 'Moorish Americans', who are described as being neither white nor Negro."

The right of the owner of a private enterprise, whether the same be a restaurant or other form of private business enterprise, to make such selection of customers or patrons as he desires has been repeatedly upheld by the appellate courts of the various states (MADDEN v. QUEENS COUNTY JOCKEY CLUB, 269 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; TERRELL WELLS SWIMMING POOL v. RODRIGUEZ TEX. CIV. APP., 182 S. E. 2d 824; BOOKER v. GRAND RAPIDS MEDICAL COLLEGE, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S., 447; YOUNGER v. JUDAH, 111 Mo. 303, 19 S. W. 1109; GOFF v. SAVAGE, 122 Wash. 194, 210 P. 374; DE LA YSLA v. PUBLIX THEATRES CORPORATION, 82 Utah 598, 26 P. 2d 818; BROWN v. MEYER SANITARY MILK CO., 150 Kan. 931, 96 P. 2d 651; HORN v. ILLINOIS CENT. R. CO., 327 Ill. App. 498, 64 N. E. 2d 574; COLEMAN v. MIDDLESTAFF, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; FLETCHER v. CONEY ISLAND, 100 Ohio App. 259, 136 N. E. 2d 344; ALPAUGH v. WOLVERTON, 184 Va. 943, 36 S. E. 2d 906.).

This rule was recognized by Mr. Justice Holmes in TER-

MINAL TAXICAB CO. v. KUTZ, 241 U. S. 252, 256; 60 L. ed. 984, 36 S. Ct. 583, where he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing on the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *."

A

*The Argument of Custom and Usage*

The question the Court is actually facing in this argument from custom and usage is whether or not by some metaphysical or transcendental process custom and usage is transformed or converted into state action. Petitioners apparently argue that this is enough but if it should not be enough, then the addition of property affected with public interest, enforcement by court action and licensing requirements would surely be enough to constitute state action as they allege. Of course, the statute giving an action for deprivation of rights (42 USC 1983) uses the words "custom, or usage", but this must be construed in connection with the deprivation of definite rights or privileges of a constitutional nature that are fixed and established. For example, the same is true in regard to the holding in SHELLEY v. KRAEMER, 334 U. S. 1, 92 L. ed. 1161, 68 S. Ct. 836, for the Federal statute (42 USC 1982) guaranteed all persons the same right as is enjoyed by white citizens "to inherit, purchase, lease, sell, hold, and convey real and personal property." If it is true, therefore, that the private action of private owners and operators of restaurants and other private enterprises in choosing to serve patrons of any one race or in choosing to serve persons of any particular national or racial descent becomes state action, then there is no area in the choice of companions according to personal selection, racial or affinities of blood or any other preferences, irrational or illogical though they may

be, which will be free from constitutional interference in the name of and under the guise of state action.

The limits of the logic used by the petitioners would certainly be that the Fourteenth Amendment eventually requires every citizen to select his personal friends and associates according to a racial or ethnic cross section which would be made up of persons having different and varied ancestries. If the members of a certain racial group wish to patronize a certain restaurant to the exclusion of certain other groups and the owner of the restaurant agrees, then this would violate the Constitution according to this theory. If the theory of the petitioners is the correct interpretation of the Fourteenth Amendment, then no private club, such as a country club, can set up rules of eligibility which would exclude colored people for that very act, as well as the act of one who argued in such a club for the exclusion of colored people, would be state action. Sometimes white families in the Southern States who own large residences will rent rooms that are not needed, and if they excluded Negroes in their renting procedures they would violate the Constitution. Occasionally such families will furnish meals, and if they customarily refuse to serve Negroes while serving white people, then under this theory they will be liable for damages under 42 USC 1983 or could be imprisoned under 18 USC 242. Under this theory the Mormon Church would be discriminating against colored people by state action, because, we are told, they exclude colored people from their membership, and, likewise, the regular Masonic lodges organized and operated by white persons would also be guilty, because, we are told, they also exclude colored people.

The protection which the Fourteenth Amendment extends even to white people as a guarantee of some freedom of choice and individualism is recognized even by those persons who strongly approve of the decision in the Brown Case and who are the foes of segregation in all areas where the state has the least influence. For example: Professor Edmond Cahn, Professor of Law at New York University School of Law, in his article on Jurisprudence (30 New York Univer-

sity Law Review 150, 156), has this to say:

> "But there are limits—even to the just claims of a political democracy. It would be ridiculous to contend that every citizen ought to select his or her social companions from a proportionate cross-section of the ethnic groups that make up the American people. If there is any area in which personal tastes, affinities, and irrational preferences may healthfully govern our behavior, it is in the process of selecting our social companions. When we resolve to observe the principles of the Constitution in every activity that is sponsored or controlled by government, our ability to do so in a willing and congenial manner may well depend on our being free, spontaneous, and unhampered in the remainder of our relationships. Somehow, sometime people will consort with whom they choose. For this reason, the distinction between official and unofficial segregation—a distinction to which the Supreme Court has adhered consistently—seems indispensable to furthering harmony among diverse racial groups. Discrimination in regard to corporate advantages (such as transportation, housing, employment, political franchise, or educational opportunity) violates the American promise; but discrimination in the choice of friends and private associates may furnish the very safety valve that many Americans require for psychic health. Friendship draws its sustenance from a fund of common experiences and inclinations; and in the majority of cases, group culture and affiliation will continue to be a primary factor."

Professor Cahn in the same article (p. 167) is also distrustful of the behavioral sciences. On this point he says:

> "In the first place, since the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today's sanguine asservation may be canceled by tomorrow's new revelation—or new technical fad. It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. Today the social psychologists—at

least the leaders of the discipline—are liberal and egalitarian in basic approach. Suppose the generation hence, some of their successors, were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racists' notions and label them 'science'. What then would be the state of our constitutional rights?"

B

*Invoking the Aid of the Court in Private Discrimination*

If the petitioners have a constitutional right to go in and upon restaurant property whenever they choose, then certainly the invoking of the aid of the Court would be state action. We certainly recognize that the term "state action" includes action through a state legislature, through state courts or through executive or administrative officers (CARTER v. TEXAS, 177 U. S. 442, 44 L. ed. 839, 20 S. Ct. 687). State action certainly includes state inaction where there is a duty to act (LYNCH v. UNITED STATES, 5 Cir., 189 F. 2d 902). It is not denied that the action of a police officer, if he acts contrary to law, is state action (VALLE v. STENGEL, 3 Cir., 176 F. 2d 697). We believe, however, a police officer can engage in state action rightfully and that color is not an exemption from the application of constitutional laws.

We will discuss the question of whether or not the general trespass statute of North Carolina under which the petitioners were indicted is void by reason of vagueness.

At the beginning of the discussion on this point it should be squarely stated that if the petitioners had a constitutionally protected right to go in and upon the property and premises of the owner of the restaurant in this case, then there is no question as to the effect of the state action of the police officer, as well as the exertion of the judicial power of the North Carolina Courts. We have previously cited several cases, both State and Federal, showing that the owner of a restaurant has a right to choose his patrons for any reason

that pleases him. In addition, we have already cited several cases showing that this same rule applies to various forms of private enterprises other than restaurants and that absent a statute to the contrary the owner controls the patronage of his premises and limits the access to his premises under such limitations as he chooses. A custom or usage as to what races or groups shall eat meals together in accordance with the approval of the owner is not invalid unless it violates a previously established constitutional right. The question is well stated in 46 Virginia Law Review 128, where the author of the note says:

> "Therefore, to state a cause of action, the victim of private discriminations must show that enforcement by the state will deprive him of a constitutional or statutory right which exists apart from the mere fact that state enforcement is present. Although the Fourteenth Amendment prohibits any racial discrimination by a state activity, it imposes no duty upon the state to protect an individual from private discrimination."

A state in enforcing its trespass statutes against trespassers who have been warned to leave the premises is not inducing others to discriminate but is upholding the property owner's rights even if the end result is private discrimination. As previously pointed out in our Statement of Facts, the petitioners were preparing for their case in court, and it is admitted that they could enter part of the store and make purchases at the various counters, and this is said to give the petitioners the right to go anywhere in the store that they desire. Great stress is also placed upon an implied invitation to come into the store but up to this time such implied invitation or license has always been revocable. We think the Supreme Court of North Carolina is supported by the great weight of judicial authority in this Nation when it said in this case:

> "In an Annotation in 9 ALR, p. 379, it is said: 'It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if

> he refuses to leave when requested to do so.' The Annotation cites cases from eight states supporting the statement. See to the same effect, BROOKSIDE—PRATT MIN. CO. v. BOOTH, 211 Ala. 268, 100 So. 240, 33 ALR 417, and Annotation in 33 ALR 421."

This same principle was also stated by Mr. Justice Holmes in TERMINAL TAXICAB CO. v. KUTZ, 241 U. S. 252, 256, 60 L. ed. 984, 987, 36 S. Ct. 583, when writing for the Court he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been, in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *".

The general trespass statute of North Carolina (G. S. 14-134) is a neutral statute, and there is not the slightest evidence in the record that this statute nearly a century old was directed toward or designed for any racial purposes. There is not the slightest evidence in the record that its administration over the decades in which it has been in effect has been directed towards the colored race as being singled out from other groups. We have already given an instance in which our trespass laws were used to protect an old colored woman as against the depredations of six white men in cutting and carrying off her timber. In the case before the Court the statute was enforced against two white persons along with the colored persons. It was not enforced at the instance of the State or at the instance of any State officer for it is clear from the record that the Manager of the Corporation requested the Durham Police to take action. The statute is available for the protection of colored people engaged in private enterprise as well as white people, and this, therefore, does not represent a case of State enforcement through indiscriminate imposition of inequalities. Even though the proprietor of a cafe or restaurant may be prompted by the motive of color it is

the person who trespasses and who refuses to leave whatever may be the color or race.

We have heretofore thought that the lawyer could choose his partner or his clients on any basis that he privately adopted and that seemed proper to him. We never thought that because there was an implied invitation to enter his office, which may border on the public street, that a lawyer had to accept a colored client under the Fourteenth Amendment if he did not want to do so. The same would be true as to doctors, dentists and all skilled and professional people who offer their services to the public.

This Court has been careful to say in cases decided where state action was concerned that private discrimination was not involved. For example: In SHELLEY v. KRAEMER, 334 U. S. 1, 92 L. ed. 1161, 68 S. Ct. 836, involving discriminatory covenants held to be in violation of the Fourteenth Amendment in which the courts were resorted to for enforcement, this Court said:

> "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (UNITED STATES v. HARRIS, 106 U. S. 629, 27 L. ed. 920, 1 S. Ct. 601; UNITED STATES v. CRUIKSHANK, 92 U. S. 542, 23 L. ed. 588)

In BOYNTON v. VIRGINIA, 364 U. S. 454, 5 L. ed. 2d 206, 81 S. Ct. 182, this Court held that a restaurant in a bus terminal could not conduct business in a segregated manner because of the Interstate Commerce Act; this Court, however, said:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

Apparently general trespass statutes have been recognized in an indirect manner by this Court as being valid. In MARTIN v. CITY OF STRUTHERS, 319 U. S. 141, 147, 87 L. ed. 1313, 63 S. Ct. 862, Mr. Justice Black said:

"Traditionally, the American Law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least 20 states, while similar statutes of narrower scope are on the books of at least 12 states more. * * *"

In MARSH v. ALABAMA, Title 14, Sec. 426 of the Alabama Code, made it a crime to enter or remain on the premises of another after having been warned not to do so. The appellant, a Jehovah's Witness, came on the sidewalk in the company-owned town, stood near the post office and undertook to distribute religious literature. This Court did not in any wise question the validity of the trespass statute but simply held that the company-owned town was such a part of the functioning community that the channels of communication must remain free and that the results of the trespass statute were inapplicable or insulated by reason of freedom of press, speech and religion.

In BREARD v. ALEXANDRIA, 341 U. S. 622, 95 L. ed. 1233, 71 S. Ct. 920, this Court on balancing the rights of the parties said it would be a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents.

There are certain cases relied upon by petitioners which we do not think are pertinent or applicable to this situation. In this line of cases there were definite constitutional rights to be protected, and there was action on the part of the state and these cases represent discrimination in areas of governmental activity. They pertain, for example, to situations where a state grants a franchise to a public utility (BOMAN v. BIRMINGHAM TRANSIT COMPANY, 5 Cir., 280 F. 2d. 531; BROWDER v. GAYLE, 142 F. Supp. 707, aff'd. 353 U. S. 903; FLEMING v. SOUTH CAROLINA ELEC. & GAS CO., 4 Cir., 224 F. 2d 752). There is also a line of cases where a state or a subdivision of a state operates restaurants, playgrounds, parks or other facilities, either itself or through its lessee, in which there can be no discrimination (BURTON

v. WILMINGTON PARKING AUTHORITY, 365 U. S. 715, 6 L. ed. 2d 45, 81 S. Ct. 56; DERRINGTON v. PLUMMER, 5 Cir., 240 F. 2d 922; CITY OF GREENSBORO v. SIMKINS, 4 Cir., 246 F. 2d 425; DAWSON v. BALTIMORE, 4 Cir., 220 F. 2d 386, aff'd. 350 U. S. 877). The same rules also are settled in the school cases, such as the Brown Case and the Bolling Case.

The right to use, enjoy and manage property, as well as to own property, existed before the Constitution of the United States was adopted, and while it is true that the use of property has been regulated for reasons of health, suppression of nuisances, fire protection, and in the realm of public utilities, this has not destroyed the right of the owner to have such persons as he chooses on his property. We quote some excerpts as to the rights of property owners, as follows:

> "The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." (11 Am. Jur., Constitutional Law, Sec. 335)

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one whom he can make contacts, and if he is wrongfully deprived of this right he is entitled to redress." (MYERS v. MEMPHIS, 135 Tenn. 263; Ann. Cas. 1918 C, 856 (272)).

> "Every man has the right to labor or refuse to labor for another, and he may base such refusal on any grounds he may choose, and even on mere whim, preju-

dice or malice. The right to labor or to employ labor and to make contracts with respect thereto, upon such terms as may be agreed upon, besides being a property right, is incident to the freedom of the individual, and is as fully protected by law as any other personal or private right." (6 R. C. L. 268, 269 (Sec. 253) note 10)

"Since it is the inherent and inalienable right of every man freely to deal, or refuse to deal, with his fellowman, the free and untrammeled right to contract is a part of the liberty guaranteed to every citizen, and as being within the protection of the fourteenth amendment to the Constitution of the United States." (6 R. C. L. 269; 270 (Sec. 254) notes 16, 17 and 18)

"The invitation may be limited at will. No one has a right to demand admission or consideration, and this may be denied arbitrarily. Under such circumstances discrimination against persons because of their color is not a violation of any right recognized by law. Such discrimination represents a social distinction, which, although arbitrary and sometimes extremely exasperating, has no remedy under law." (5 R. C. L. 586(10), 56 Am. Rep. 355, 1 L.R.A. 1188, 25 N.W. 766)

C

*The Attaining of a License from the State to Operate a Restaurant*

It is the contention of the petitioners that because the operator of the luncheonette in this case was required to obtain certain State licenses this converts the operator into a person who is able to take state action, and, therefore, his action in having the petitioners expelled from the premises is state action. This question was raised in the case of WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, supra, where the Court said:

"The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities * * * The license laws of Virginia do not fill the void. Sec. 35-26 of the Code of Virginia, 1950, makes it unlawful for any

person to operate a restaurant in the State without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served."

The same argument was made in SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., supra, where the Court said:

"The license laws of the State of Maryland applicable to restaurants are not regulatory * * * The City Ordinance, No. 1145, November 27, 1957, adding Sec. 60-1/2 to Article 12 of the Baltimore City Code, 1950 Edition, which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes state or city officials to control the management of the business of a restaurant or to dictate what persons will be served.

"Even in the case of licensees, such as racetracks and taverns, where the business is regulated by the State, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment."

In the case of MADDEN vs QUEENS COUNTY JOCKEY CLUB, 296 N. Y. 249, 72 N. E. 2d 697, the Court said:

"A license . . . is no more than a permission to exercise a pre-existing right which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligations to the public * * * Adopting plaintiff's position, it would be equally valid to argue that every licensee, theater manager, cab driver, barber, liquor dealer, dog owner—to mention a few—must be regarded as 'an administrative agency of the state' in the conduct of his everyday business simply because he pays a tax or fee for his license."

It is clear that a license from the Government does not

create an area of governmental assistance or convert a private business into such a public business that the owner or operator is endowed with the capacity of state action. It is a form of regulation as to sanitation or adequate food refrigeration accompanied in most cases by tax, and anyone who meets the requirements can be licensed. Such regulation cannot be dogmatically equated with state control or action so as to bring into play the operation of the Fourteenth Amendment, and state action is not the equivalent of the state's conditions required to operate a restaurant.

D

*The Operation of a Restaurant is Not a Business Affected with Public Interest or Public Service.*

The petitioners are in a position of persons who have a pre-determined objective, and in order to arrive at this objective they wish to dispense with the requirement of state action in the Fourteenth Amendment, and if this is not possible they wish to equate private action with state action by transforming all business operations into businesses affected with the public interest.

It is unnecessary to discuss the public service or public interest concept and trace it from the case of MUNN v. ILLINOIS, 94 U. S. 113, 24 L. ed. 77, because this Court has clearly defined and described the businesses that are affected with the public interest or, more correctly, businesses engaged in the performance of public service. These are usually such things as telephone companies, water companies, electrical companies, and transportation companies. This Court has further clearly stated that it did not include all businesses in these categories, although the businesses may have public features and aspects. For example: In WILLIAMS v. STANDARD OIL CO., 278 U. S. 235, 49 S. Ct. 115, 73 L. ed. 287, the State of Tennessee undertook to declare through its legislature that the business of selling gasoline was one affected with the public interest and to fix the prices for which gasoline could be sold within the State. In disposing of this argument, this Court said:

"It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 27 A. L. R. 1280, 43 Sup. Ct. Rep. 630; Tyson & Bro.-United Theatre Ticket Offices v. Banton, supra; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 52 A. L. R. 163, 47 Sup. Ct. Rep. 506; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 56 A. L. R. 1327, 48 Sup. Ct. Rep. 545. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect granted to the public. Tyson & Bro.-United Theatre Ticket Offices v. Banton, supra, p. 434 (71 L. ed. 724, 58 A. L. R. 1236, 47 Sup. Ct. Rep. 426). Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id. p. 430. The meaning and application of the phrase are examined at length in the Tyson Case, and we see no reason for restating what is there said.

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the busi-

ness of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."

In the case of NEW STATE ICE CO. v. LIEBMANN, 285 U. S. 262, 52 S. Ct. 371, 76 L. ed. 747, the State of Oklahoma declared that the manufacture, sale and distribution of ice was a public business and that no one could be permitted to manufacture, sell and distribute ice within the State without first having secured a license. It was further provided that there must be a necessity at the place desired, to be found by the Corporation Commission, before the license would be issued. Action was brought to restrain the defendant, who was operating without a license, and in holding that this was not such a business as was affected by the public interest and that the defendant was entitled to operate his business under the protection of the Fourteenth Amendment, this Court said:

"It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. Frost v. Corporation Commission, 278 U. S. 515, 519-521, 73 L. ed. 483, 487, 488, 49 S. Ct. 235. In that view, engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common right to be exercised independently (ibid.) by any competent person conformably to reasonable regulations equally applicable to all who choose to engage therein."

"Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a busi-

ness as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use."

In the case of WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS, 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103, the State of Kansas undertook to place a packing company under the jurisdiction of the Court of Industrial Relations whereby wages could be fixed and other terms for the future conduct of the industry. The Wolff Packing Company was engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. The Kansas Act declared that the business was affected with the public interest. In holding the Kansas Act to be unconstitutional this Court said:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. State v. Edwards, 86 Me. 102, 25 L.R.A. 504, 41 Am. St. Rep. 528, 29 Atl. 947; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 254, 60 L. ed. 984, 986, P.U.R. 1916(D), 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916(D), 765.

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and

have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly. (Citations omitted)

"It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes (United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 540; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256, 60 L. ed. 984, 987, P. U. R. 1916(D), 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916(D), 765); and while this feature does not necessarily exclude businesses from the class clothed with a public interest (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915(C), 1189, 34 Sup. Ct. Rep. 612), it usually distinguishes private from quasi public occupations."

See also: TYSON & Bro. v. BANTON, 271 U. S. 418, 47 S. Ct. 426, 71 L. ed. 718, and cases there cited.

We submit, therefore, that to hold that the operation of the restaurant business is a business devoted to public service or is a business affected with the public interest would have results not desired by the people of this Nation. If this logic is carried to its ultimate limits instead of being protected by the Fourteenth Amendment all businesses would be socialized and brought under government control. If this position of petitioners is sound, then the cafe owner and the merchant cannot fix the prices of their services and products but some government agency would be required to do so. If this position is sound, then the steel mills should be required to produce their cost records, and the President should have been allowed to have seized the property of the steel companies so as not to imperil the national defense (YOUNGSTOWN SHEET & TUBE CO. v. SAWYER, 343 U. S. 579, 72 S. Ct. 863, 96 L. ed. 1153).

E

*The Case of Shelley v. Kraemer is Not Applicable to this Situation.*

Ever since the decision in SHELLEY v. KRAEMER, 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161, a sustained effort has been made to apply this doctrine to all inequalities. It is submitted that the case has no application to this situation at all. In the first place the petitioners, who were Negroes, acquired the property subjected to the restricted covenant by warranty deed; in other words, the sale of the property between the parties concerned was by mutual agreement and was voluntary. Those who tried to enforce the restrictive covenant were third parties. In this case there is no agreement between the parties, but, to the contrary, there is disagreement in that the owner of the restaurant does not desire the presence of petitioners on his property, and in exercising his choice of customers he warned them to leave. In the second place in refusing to permit judicial

action on the part of the state for the enforcement of the restrictive covenant this Court was but giving effect to the freedom of all people of all races to acquire property without being hampered by racial obstructions. This Court was enforcing a federal statute which said: "All citizens of the United States shall have the same right, in every state and territory, as it is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This Court was careful to say that "Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color", and that "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." In the Shelley Case, therefore, the petitioners had a constitutional and statutory right to be protected and that was the equal right with all others to acquire and enjoy property.

The case is not an authority for the theory that all private activity enforced by court action is prohibited state activity. As said by the author in an article entitled: "The Impact of Shelley v. Kraemer on the State Action Concept" (44 Calif. Law Review, p. 733):

> "If obtaining court aid to carry out 'private' activity 'converts' such private action into 'state' action, then there could never be any private action in any practical sense. So entwined are our lives with the law that the logical result would be that almost all action, to be effective, must result in state action. Thus, all private activity would be required to 'conform' with the standards of conduct imposed on the states by the Fourteenth Amendment. Under the guise of protecting civil rights by 'strengthening' due process and the equal protection of the laws, is it not possible that Shelley creates a means of restricting civil liberties, making possible far greater government control of individual activity than desired?"

The case simply stands for the proposition that the courts

cannot be used to allow a person to commit an act forbidden the states by the Fourteenth Amendment. If other rights intervene, such as those of the property owner, they, too, are entitled to protection under the Fourteenth Amendment and court action would be proper.

## IV

## THE GENERAL TRESPASS STATUTE OF NORTH CAROLINA DOES NOT VIOLATE THE FOURTEENTH AMENDMENT BECAUSE OF VAGUENESS OR FAILURE TO FURNISH AN ASCERTAINABLE STANDARD OF CONDUCT.

The petitioners attack the general trespass statute of North Carolina (G. S. 14-134) under the so-called "void for vagueness" rule of constitutional law.

Here again for the convenience of the Court we quote the statute, as follows:

> "G. S. 14-134. *Trespass on land after being forbidden.*— If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

The petitioners could not have been ignorant of this statute or of what constituted prohibited conduct. The petitioners had counsel and had consulted counsel about these matters (R. 37), and certainly neither petitioners nor their counsel were ignorant of the holding of the Supreme Court in STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295, and counsel for the petitioners were certainly aware of STATE v. COOKE, 248 N. C. 485, 103 S. E. 2d 846. The case of STATE v. CLYBURN, supra, explains fully the violation of possession or what constitutes criminal trespass showing that this interpretation was not a new thing. We have heretofore explained in this brief that the statute is almost a century old and its concepts came from England with the Common Law and

that it is allied with or related to G. S. 14-126 on forcible entry and detainer, which is almost word f word a copy of 5 Richard II, enacted by the British Parli ent.

When we get down to the specific examination of statutes we find that the North Carolina statute under attack is no more vague or indefinite than the statute relied upon by petitioners, such as 14 USCA 1983, which was construed in SCREWS v. UNITED STATES, 325 U. S. 91; 65 S. Ct. 1031, 89 L. ed. 1495. When this federal statute was attacked upon the same ground, that is when the Congress did not define what it desired to punish but referred the citizen to a comprehensive library in order to ascertain what acts were prohibited, this Court upheld the act by reference to its historical framework and by referring to the fact that this was an effort of Congress extending over a period of over 80 years. Our statute is no more vague or indefinite than the Sherman Antitrust Act and the companion statute referred to as the Clayton Act. Our statute is no more vague or indefinite than the statute prohibiting interstate transportation in aid of racketeering enterprises (18 USCA 1952). Our statute is no more vague and indefinite than the federal statute which prohibits the asking or receiving of any money by a federal officer or employee for the purpose of influencing his decision on any matter. (18 USCA 201, 202). The General Statute of this State on trespass is no more vague and indefinite than the laws of any state, or, for that matter, of the Federal Government, on punishing for fraud and false pretenses.

As said in the annotation in 96 L. ed. 375:

> "Moreover, few words possess the precision of mathematical symbols; most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded."

However, not every statute stated in general terms is held to be unconstitutional, and, therefore, invalid under this rule.

In 82 C. J. S. (Statutes) p. 108, sec. 68-a, the author says:

"A statute is not rendered uncertain and void merely because general terms are used therein, or because of the employment of a term, without defining it, where such term is one commonly used or understood, or where such term is one that has acquired a well defined meaning, is sufficiently known or understandable to enable compliance with the statute, or has acquired an established meaning through established precedents, technical knowledge, or the sense and experience of men.

"A statute is not rendered invalid for uncertainty merely because of the employment of a term which may be judicially noticed, or whose meaning can be determined with little difficulty, or can be determined when read in connection with the context. The mere fact that a term used in a statute might, under some imaginary circumstances, be considered ambiguous will not render the statute inoperative as regards matters plainly falling within the meaning of such term. Ordinarily, where the terms used are suitable to the subject matter, they are sufficiently certain. The employment of novel and unfamiliar terms, which have not yet acquired any definiteness or certainty, to define a statutory duty sought to be imposed may, however, render invalid the statute in which they are employed; and the employment of terms unknown to the common law and also shown to have no well defined meaning in a particular industry to which they are directed may invalidate the statute in which they are used. Repetition of certain words in a section of an act does not render the section void for uncertainty where it is manifest from reading the paragraph that the repetition does not obscure the meaning.

"An act will not be held invalid merely because it might have been more explicit in its wording or detailed in its provisions, especially where, because of the nature of the act, it would be impossible to provide for all the details in advance, unless it is so imperfect as to render it impossible to execute it."

In 50 Am. Jur. (Statutes) p. 486, sec. 473, the author states:

"Sec. 473.—*Restrictions upon Invalidation for Uncertainty.*—The basis of the principle that courts will not,

'in doubtful cases, pronounce a legislative act to be contrary to the Constitution, applies with equal force where the courts are called upon to declare a statute to be so meaningless and unintelligible as to be inoperative, and there are many cases in which claims that particular statutes or statutory provisions are void for indefiniteness have been rejected. This is frequently illustrated in the construction of statutes regulating the operation of motor vehicles, and motor vehicle carriers, licensing of operators and other related matters. The use of such terms as 'reasonable' or 'unreasonable' in defining standards of conduct or in prescribing charges, allowances and the like, and the use of such terms as 'wilful and wanton misconduct' or 'gross negligence', 'diligent effort', 'dishonorable conduct', 'incompetence', 'violation of professional duty', etc., have been held not to render a statute invalid for uncertainty and indefiniteness. Other applications of the principle are indicated in the footnote. From these cases it is evident that absolute or mathematical certainty is not required in the framing of a statute. A statute is not necessarily void merely because it is vague, indefinite, or uncertain, or contains terms not susceptible of exact meaning, or is stated in general terms, or prescribes a general course of conduct, or does not prescribe precise boundaries, or is imperfect in its details, or contains errors or omissions, or because the intention of the legislature might have been expressed in plainer terms, and questions may arise as to its applicability, and opinions may differ in respect of what falls within its terms, or because the statute is difficult to execute. A statute will not be declared void for vagueness and uncerainty where the meaning thereof may be implied, or where it employs words in common use, or words commonly understood, or words previously judicially defined, or having a settled meaning in law, or a technical or other special meaning well enough known to enable persons within the reach of the statute to apply them correctly, or an unmistakable significance in the connection in which they are employed. In short, legislation otherwise valid will not be judicially declared null and void on the ground that the same is unintelligible and meaningless unless it is so imperfect and so deficient in its details as to render it impossible of execution and enforcement, and is susceptible of no reasonable construction that will support and give it effect, and the court finds itself unable to define the purpose and intent of the legislature. Moreover, the objection that a statute is too vague to be valid is available only to one whom it concerns."

In WILLIAMS v. UNITED STATES, 341 U. S. 97, 71 S. Ct. 576, 95 L. ed. 774, the Supreme Court of the United States had before it an attack upon a Civil Rights Statute (18 USCA 242) which is perhaps the most indefinite and the vaguest statute in the Federal Criminal Code. The statute reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . ..., shall be fined not more than $1,000, or imprisoned not more than one year, or both."

In disposing of this contention the Court said:

> "Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific."

In the case of SCREWS v. UNITED STATES, 325 U. S. 91, 65 S. Ct. 1031, 89 L. ed. 1495, the Supreme Court of the United States again upheld this same Civil Rights Statute as against the same type of constitutional attack, the Supreme Court saying:

> "But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."

In the case of OMAECHEVARRIA v. IDAHO, 246 U. S. 343, 38 S. Ct. 323, 62 L. ed. 763, the Supreme Court of the United States had before it a statute written in very general terms and which is quoted in the case as follows:

> "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suf-

fers the same to be herded, grazed, or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer, or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

In upholding this statute against an attack of void for vagueness, the Court said:

"It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guaranty by the 14th Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a 'range', or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; Miller v. Strahl, 239 U. S. 426, 434, 60 L. ed. 364, 368, 36 Sup. Ct. Rep. 147 . . . . ."

In the case of NASH v. UNITED STATES, 229 U. S. 373, 57 L. ed. 1232, the Supreme Court of the United States considered this type of attack upon the Monopoly or Antitrust Statute. In upholding the statute Mr. Justice Holmes said:

"And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court.

Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919:

> "But apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. . . . ."

We could quote from many cases and cite many other statutes written in general terms that have been upheld but for the sake of brevity we shall merely refer to a few more cases and the type of statute considered.

In FOX v. WASHINGTON, 236 U. S. 273, 35 S. Ct. 383, 59 L. ed. 573, a statute of the State of Washington which made it unlawful to print, publish, or knowingly circulate any book, paper or document advocating or inciting the commission to any crime, breach of the peace or act of violence, was upheld with Mr. Justice Holmes writing the opinion. This statute was stated in general terms.

In WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095, the Criminal Syndicalism Act of California, which prohibited teaching or advocating the commission of crime, sabotage, unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, was upheld as against this type of attack.

In GORING v. UNITED STATES, 312 U. S. 19, 61 S. Ct. 429, 85 L. ed. 488, the Supreme Court had before it on this same type of attack the Espionage Act of June 15, 1917. The words "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation", were said to be sufficiently definite for a criminal statute.

In UNITED STATES v. RAGAN, 314 U. S. 513, 62 S. Ct.

374, 86 L. ed. 383, the Supreme Court of the United States upheld a provision of the Revenue Act of 1932, declaring guilty of a felony, simply said: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or any payment thereof" as not being too vague or a delegation of power. As against the same charge the clause "a reasonable allowance for salaries or other compensation for personal service actually rendered" was also upheld. The Court upheld the rule that a successful attack based on undue vagueness cannot be made where the sanctions of the statute apply only if intent or scienter is first established.

See also on this point the following authorities:

BOYCE MOTOR LINES v. UNITED STATES, 342 U. S. 337, 72 S. Ct. 329, 96 L. ed. 367;

ROTH v. UNITED STATES, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. 2d 1498;

UNITED STATES v. PETRILLO, 332 U. S. 1, 67 S. Ct. 1538, 91 L. ed. 1877;

MILLER v. STRAHL, 239 U. S. 426, 36 S. Ct. 147, 60 L. ed. 364;

BEAUHARNAIS v. ILLINOIS, 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725;

COLE v. ARKANSAS, 338 U. S. 345, 94 L. ed. 155, 70 S. Ct. 172;

UNITED STATES v. WURZBACH, 280 U. S. 396, 50 S. Ct. 167, 74 L. ed. 508.

See also the following Law Review articles:

21 Michigan Law Review 831;

40 Cornell Law Quarterly 195;

30 Yale Law Journal 437;

62 Harvard Law Review 77;

109 University of Pennsylvania Law Review 67.

## V

## THE NORTH CAROLINA STATUTE AS ADMINISTERED DOES NOT VIOLATE FREEDOM OF SPEECH AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The petitioners' claim that their constitutional right to freedom of speech is violated by the administration of the North Carolina statute is the least tenable of all their arguments. The record fully shows that the petitioners and those affiliated with them had for days been exercising their right of protest and freedom of speech by statements and slogans on placards or banners which they carried up and down the streets in front of the stores, including the store of S. H. Kress & Company.

Freedom of speech is not a protective armor with which petitioners can cover themselves and take possession of other owners' property and violate any statute they choose. The petitioners can cover themselves with an atmosphere or aura of free speech for any of their predetermined objectives and this would protect them from the violation of any law. They could force their entrance in and upon any property, including the home, and so long as they carried a placard with printed words and kept talking in support of some cause they would be insulated from the application of all criminal statutes.

It is submitted that even the right of freedom of speech has its reasonable and well justified limitations.

In the case of INTERNATIONAL BROTHERHOOD v. HANKE, 339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995, this Court said:

"Here, as in HUGHES v. SUPERIOR COURT, 339 U. S.

460, ante., 985, 70 S. Ct. 718, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protective freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid'. * * * The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the state to set the limits of permissible contest open to industrial combatants'."

In this same case this Court further said:

"A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect."

In KOVACS v. COOPER, 336 U. S. 77, 69 S. Ct. 448, 93 L. ed. 513, this Court sustained an ordinance which limited the right of communication through loud speakers. In this connection the Court said:

"Of course, even the fundamental rights of the Bill of Rights are not absolute. The SAIA case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, SCHENCK v. UNITED STATES, 249 U. S. 47, 52, 63 L. ed. 470, 473, 39 S. Ct. 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.'

"Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

In the case of MILK WAGON DRIVERS UNION v. MEADOWMOOR DAIRIES, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836, the Court sustained an injunction against picketing where there was a history of past violence against a plea of freedom of speech and distinguished the case from that of THORNHILL v. ALABAMA, 310 U. S. 88, 84 L. ed. 1093, 60 S. Ct. 736 cited by the petitioners, and said:

> "This is precisely the kind of situation which the Thornhill opinion excluded from its scope. 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U. S. 105, 84 L. ed. 1104, 60 S. Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coersive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

In GITLOW v. NEW YORK, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138, this Court sustained a conviction based upon the New York statutes, dealing with *criminal anarchy*, as against a defense of freedom of speech.

In BREARD v. CITY OF ALEXANDRIA, 341 U. S. 622, 71 S. Ct. 920, 95 L. ed. 1233, this Court held constitutional a municipal ordinance which prohibited peddlers from calling upon occupants of private residences without having been requested or invited to do so.

In GIBONEY v. EMPIRE STORAGE & ICE CO., 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834, it was held that the constitutional right of free speech did not preclude an injunction against peaceful picketing by an ice peddlers' union for the purpose of coercing a wholesale distributor to agree to refrain from selling ice to peddlers not members of the union. In this connection this Court said:

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech and writing used as an integral part of conduct in violation of a criminal statute. * * * Neither THORNHILL v. ALABAMA, 310 U.S. 88, 84 L. ed. 1093, 60 S. Ct. 736, supra, nor CARLSON v. CALIFORNIA, 310 U. S. 106, 84 L. ed. 1104, 60 S. Ct. 746, both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. * * * It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. See, e. g., FOX v. WASHINGTON, 236 U. S. 273, 277, 59 L. ed. 573, 575, 35 S. Ct. 383; CHAPLINSKY v. NEW HAMPSHIRE, 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade, as well as many other agreements and conspiracies deemed injurious to society."

Unless the petitioners had a right, along with their associates, to come in and take possession of a private owner's property, then this portion of petitioners' argument could not possibly be sustained.

## VI

## CONCLUSION

It is not the contention of the State of North Carolina that property rights cannot be regulated. However, what the petitioners demand in this case goes much further towards the abridgement of property and indeed towards the socialization of property than anyone has ever thought proper since this Nation secured its independence in the American Revolution. If this Court grants the request of petitioners then the owner of the bare legal title of property will be

subjected to such intense social regulation that it will be analogous to property held in the corporative state.

When this Court decided BROWN v. MISSISSIPPI, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682, the members of this Court no doubt never dreamed that a course of action had been initiated that would lead to such expansive federal review of state criminal cases. The logic of petitioners in this case, if sustained, will not leave any place where people of the same tastes, affinities, congenialities and race can meet together in a club, in the home, or any other place of assembly because all of these places are to some extent regulated by the state.

Petitioners realize that their logic, as derived from their premises, leads to great extremes and they try to hedge against these extremes. For example, must the petitioners be given entrance to the office of the manager and must they be allowed to go to the stockroom? Suppose the clerks tell petitioners that they do not have certain articles and the petitioners think they can find some of the articles in the stockroom, can they go to the stockroom over the protest of the management? Suppose private proprietors are compelled to sell to petitioners, at what price must they sell? If a private proprietor sold articles or food to his friends at no cost or at a cheaper rate than usual, would this violate petitioners' civil rights? Under their own theory, why should not petitioners be allowed to enter into any private home they desire so long as they say that they are protesting and exercising free speech? The petitioners' request should not be granted unless the Court thinks we should have a completely socialized state. There should be left to an individual some property rights that he can call his own or else why should we have the institution of private property? We ask the Court not to take such a step and in this connection we again remind the Court of the language this Court used in civil rights cases (109 U. S. 3) when it said:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable

> concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected."

Under the decisions of this Court it is abundantly clear that state action, as contemplated by the Fourteenth Amendment, does not include purely private action. (CIVIL RIGHTS CASES, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835; UNITED STATES v. CRUIKSHANK, 92 U. S. 542, 23 L. ed. 588; VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667; EX PARTE VIRGINIA, 100 U.S. 339, 25 L. ed. 676; CORRIGAN v. BUCKLEY, 271 U S. 323, 46 Sup. Ct. 521, 70 L. ed. 969)

We respectfully submit that the Supreme Court of North Carolina decided this case in a valid and constitutional manner and should be upheld.

Respectfully submitted,

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